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**IN THE UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN MARIANA ISLANDS**

PAUL MURPHY,

Plaintiff,

v.

ROBERT A. GUERRERO, in his official  
capacity as Commissioner of the Department  
of Public Safety of the Commonwealth of  
the Northern Mariana Islands, and LARISSA  
LARSON, in her official capacity as  
Secretary of the Department of Finance of  
the Commonwealth of the Northern Mariana  
Islands,

Defendants.

Civil Action No. 14-0026

**NOTICE OF MOTION AND CROSS  
MOTION FOR SUMMARY  
JUDGMENT**

**Date: July 28, 2016**

**Time: 1:30 p.m.**

**Judge: Ramona V. Manglona, C.J.**

**COMES NOW**, Defendant Robert A. Guerrero, in his official capacity as Commissioner of the Department of Public Safety for the Commonwealth of the Northern Mariana Islands, and Larrisa Larson, in her official capacity as Secretary of the Department of Finance for the Commonwealth of the Northern Mariana Islands, by and through counsel Charles E. Brasington, and hereby move the Court, pursuant to Federal Rule of Civil Procedure 56(a), for summary judgment as to all counts of the Plaintiff's Fourth Amended Complaint.

In support of this Motion, the Commonwealth relies upon the Memorandum of Law that is

1 filed contemporaneously with this Motion.

2 RESPECTFULLY  
3 SUBMITTED.

4 DATED: June 30, 2016

OFFICE OF THE ATTORNEY GENERAL

/s/ Charles E. Brasington

Charles E. Brasington  
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**MEMORANDUM IN SUPPORT OF  
CROSS MOTION FOR SUMMARY  
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1     **I.     INTRODUCTION<sup>1</sup>**

2             Plaintiff Paul Murphy argues that the Commonwealth infringes upon his Second  
3     Amendment rights by: (1) restricting the possession and importation of long guns<sup>2</sup> of calibers  
4     greater than .22, .223, and .410; (2) requiring the registration of firearms and firearm owners; (3)  
5     banning the possession of “assault rifles”; (4) banning large capacity magazines (“LCMs”); (5)  
6     requiring unattended firearms in the home to be locked in a safe; (6) requiring firearms to be  
7     transported unloaded and separate from ammunition; (7) imposing a \$1,000 excise tax on every  
8     handgun imported into the Commonwealth.  
9

10    **II.    STATEMENT OF UNDISPUTED FACTS**

11            Murphy is a citizen of the United States and of the Commonwealth. (3rd Am. Compl. ¶ 7;  
12     Answer ¶ 7.) On July 30, 2007, Murphy attempted to bring a Glock 19 9 mm (.30 caliber) handgun,  
13     a 7.62 × 39 mm caliber WASR 10/63 rifle, several varieties of 7.62 × 39 mm ammunition, and a 9  
14     mm bullet into the Commonwealth. (Ex. 13.)<sup>3</sup> These items were confiscated. (*Id.*) Murphy caused  
15     the firearms to be transferred to Guam for safekeeping. (Ex. 14.) At least some of the ammunition  
16     is in the custody of the Department of Public Safety. (Ex. 13.)  
17

18            Murphy was issued a Weapons Identification Card in September 20, 2007, (Ex. 4). The  
19     most recent Weapons Identification Card issued to Murphy expired on April 10, 2015. (Ex. 5.) It  
20     is unclear whether Murphy currently possesses a valid Weapons Identification Card as required by  
21     law. If it has expired, the Commonwealth urges him to renew his card to avoid criminal liability  
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<sup>1</sup> Defendants are referred to in this Memorandum as “the Commonwealth.”

24            <sup>2</sup> Courts use the term “long gun” to refer to rifles and shotguns. *See, e.g., Nat’l Shooting*  
25     *Sports Found., Inc. v. Jones*, 716 F.3d 200, 205 (D.C. Cir. 2013) (“Mexican cartels have made  
26     long guns (i.e. rifles and shotguns) their new ‘weapons of choice.’”). The term “firearm” is in this  
27     Memorandum to refer collectively to handguns, rifles, and shotguns.

28            <sup>3</sup> This Memorandum refers to Exhibits 1–24, filed by Murphy on Sept. 14, 2015, at ECF  
   No. 47, 47-1 to 47-25.

1 or undermining his standing to bring the case.

2 The Parties to this case briefed and argued motions for summary judgment under a  
3 Murphy's Fourth Amended Complaint. However, before an order was issued, this Court issued its  
4 decision in *Radich v Deleon Guerrero*, 14-cv-00020, on March 28, 2016, striking down the  
5 Commonwealth's ban on the possession of handguns by private citizens for self defense as a  
6 violation of the Second Amendment. The Commonwealth acted swiftly to enact the Special Act  
7 for Firearms Enforcement (SAFE), Public Law 19-42, which was originally proposed by the Office  
8 of the Attorney General. The Office of the Attorney General drafted the provisions after reviewing  
9 the laws of other U.S. jurisdictions and Second Amendment case law, in an effort to provide  
10 comprehensive legislation that protected public safety while protecting Second Amendment  
11 Rights. The Court denied the motions based on mootness, and Murphy filed his current complaint,  
12 renewing his original challenges as well as challenging provisions under SAFE.

### 13 **III. STANDARD FOR SUMMARY JUDGMENT**

14 Summary judgment must be granted "if the movant shows that there is no genuine dispute  
15 as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.  
16 56(a). The moving party must identify the pleadings, depositions, affidavits, or other evidence that  
17 it "believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*,  
18 477 U.S. 317, 323 (1986). "The burden of establishing the nonexistence of a 'genuine issue' is on  
19 the party moving for summary judgment." *Id.* at 330. (citations omitted). "This burden has two  
20 distinct components: an initial burden of production, which shifts to the nonmoving party if  
21 satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the  
22 moving party." *Id.* "If the movant fails to discharge his initial burden of production, then the Court  
23 is not required to determine whether the movant has satisfied his burden of persuasion." *Id.* Further,  
24 "[i]f a moving party fails to carry its initial burden of production, the nonmoving party has no  
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1 obligation to produce anything, even if the nonmoving party would have the ultimate burden of  
2 persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102–03 (9th Cir.  
3 2000). In addition, “[w]hile suitable inferences may be drawn by the trial court in ruling on a  
4 motion for summary judgment, all such inferences are to be drawn against the moving party.”  
5 *Pepper & Tanner, Inc. v. Shamrock Broad., Inc.*, 563 F.2d 391, 395 (9th Cir. 1977).

#### 7 **IV. ARGUMENT**

##### 8 **A. SECOND AMENDMENT ANALYSIS**

9 The Second Amendment provides:

10 A well regulated Militia, being necessary to the security of a free State, the right of  
11 the people to keep and bear Arms, shall not be infringed.

12 U.S. Const. amend. II. The U.S. Supreme Court has held that the Second Amendment protects the  
13 right of individuals to own handguns, and to keep firearms in the home for self-defense purposes.  
14 *District of Columbia v. Heller (Heller I)*, 554 U.S. 603 (2008). The Supreme Court later held that  
15 the Second Amendment applies to the several States through the due process clause of the  
16 Fourteenth Amendment. *McDonald v. Chicago*, 561 U.S. 742 (2010). Under Section 501(a) of the  
17 Covenant,<sup>4</sup> both the Second and Fourteenth Amendments apply to the Commonwealth “as if the  
18 Northern Mariana Islands were one of the Several States.” Covenant § 501(a).

20 Importantly, the U.S. Supreme Court’s holding in *Heller I* was limited. In *Heller I*, the  
21 Court cautioned: “the right secured by the Second Amendment is not unlimited. From Blackstone  
22 through the 19th-century cases, commentators and courts routinely explained that the right was  
23 not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever  
24 purpose.” 554 U.S. at 626. The Court continued:

25 Nothing in our opinion should be taken to cast doubt on longstanding prohibitions  
26 on the possession of firearms by felons and the mentally ill, or laws forbidding the

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27 <sup>4</sup> Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political  
28 Union with the United States of America, 48 U.S.C. § 1801 note [hereinafter Covenant].

1 carrying of firearms in sensitive places such as schools and government buildings,  
2 or laws imposing conditions and qualifications on the commercial sale of arms.

3 *Id.* at 626–27. Indeed, the Court went so far as to describe the forgoing examples as a non-  
4 exhaustive list of “presumptively lawful regulatory measures.” *Id.* at 626–27 n.26.

5 The Supreme Court did not identify a level of scrutiny for Second Amendment challenges.  
6 As such, the U.S. Court of Appeals for the Ninth Circuit, like many of its sister circuits, adopted a  
7 two-step approach based largely on First Amendment jurisprudence. *Jackson v. City & Cty. of San*  
8 *Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 2799, 192 L. Ed. 2d 865  
9 (2015). When considering Second Amendment challenges to legislation, courts in the Ninth  
10 Circuit “(1) ask[] whether the challenged law burdens conduct protected by the Second  
11 Amendment and (2) if so, [] apply an appropriate level of scrutiny.” *Jackson*, 746 F.3d at 960  
12 (quoting *United States v. Chovan*, 735 F.3d 1127, 1136–37 (9th Cir. 2013)).

14 In applying the first step, courts in the Ninth Circuit “ask ‘whether the challenged law  
15 burdens conduct protected by the Second Amendment,’ based on a ‘historical understanding of the  
16 scope of the [Second Amendment] right,’ or whether the challenged law falls within a ‘well-  
17 defined and narrowly limited’ category of prohibitions ‘that have been historically unprotected.’”  
18 *Jackson*, 746 F.3d at 960 (quoting *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 792 (2011);  
19 *Heller I*, 554 U.S. at 625; and *Chovan*, 735 F.3d at 1136). To determine “whether a challenged law  
20 falls outside the historical scope of the Second Amendment,” courts “ask whether the regulation  
21 is one of the ‘presumptively lawful regulatory measures’ identified in *Heller I*, or whether the  
22 record includes persuasive historical evidence establishing that the regulation at issue imposes  
23 prohibitions that fall outside the historical scope of the Second Amendment.” *Id.*

26 In applying the second step, courts in the Ninth Circuit must first identify the applicable  
27 level of scrutiny: intermediate or strict. Courts identify the appropriate level of scrutiny by  
28 considering two prongs: (a) “how close the law comes to the core of the Second Amendment right”

1 and (b) “the severity of the law’s burden on the right.” *Id.* at 960–61 (quoting *Chovan*, 735 F.3d  
2 at 1138). As to step 2(a),<sup>5</sup> “the Second Amendment has ‘the core lawful purpose of self-defense,’  
3 and that ‘whatever else it leaves to future evaluation, [the Second Amendment] surely elevates  
4 above all other interests the right of law-abiding, responsible citizens to use arms in defense of  
5 hearth and home.’” *Id.* at 961 (quoting *Heller I*, 554 U.S. at 630, 635). As to step 2(b), “laws which  
6 regulate only the ‘manner in which persons may exercise their Second Amendment rights’ are less  
7 burdensome than those which bar firearm possession completely.” *Id.* (quoting *Chovan*, 735 F.3d  
8 at 1138). Furthermore, “firearm regulations which leave open alternative channels for self-defense  
9 are less likely to place a severe burden on the Second Amendment right than those which do not.”  
10 *Id.*

11  
12 **B. THE BASIC REGISTRATION REQUIREMENT IMPOSES A *DE MINIMUS* BURDEN, AND**  
13 **IS CONSTITUTIONAL.**

14 The basic registration requirement for firearms and firearm owners under Commonwealth  
15 law is constitutional. First, firearm registration requirements are long standing, and are  
16 presumptively constitutional under *Heller*, 544 U.S. 626–27. Second, basic registration  
17 requirement is a de minimus burden. The fact that the registration scheme incidentally impacts an  
18 individual constitutional right is of no consequence, as basic registration requirements for voting  
19 are ubiquitous throughout the several States and territories. *See Rosario v. Rockefeller*, 410 U.S.  
20 752, 754–58 (1973) (requiring registration 30 days before general election did not violate right to  
21 vote).

22  
23 Title 6, § 2204 requires an individual to possess a Weapons Identification Card before he  
24 or she acquires or possesses a firearm or dangerous device. Section 2204 is constitutional because  
25 basic registration and licensing requirements are longstanding and presumptively lawful. *Heller v.*  
26

27  
28 <sup>5</sup> As the Ninth Circuit’s Second Amendment analysis uses a bifurcated second step, this  
Memorandum will refer to the two parts of the second step as 2(a) and 2(b).

1 *District of Columbia (Heller III)*, 801 F.3d 264, 274–75 (D.C. Cir. 2015) (registration of long  
2 guns); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1254 (D.C. Cir. 2011)  
3 (registration of handguns); *Justice v. Town of Cicero*, 577 F.3d 768, 773–75 (7th Cir. 2009)  
4 (holding local ordinance “requiring the registration of all firearms” is consistent with the Supreme  
5 Court’s ruling in *Heller I*). Many states had created firearm registration requirements by the end  
6 of the 1920s. *See Heller II*, 670 F.3d at 1253–55. Furthermore, the Court of Appeals for the District  
7 of Columbia explained that registration requirements are “self-evidently de minimis, for they are  
8 similar to other common registration or licensing schemes, such as those for voting or for driving  
9 a car, that cannot reasonably be considered onerous.” *Heller II*, 670 F.3d at 1254–55. The cost of  
10 registering a firearm is \$25 per firearm. NMIAC § 150-70-120. This is a de minimus burden. As  
11 the basic registration requirements are longstanding and only place a de minimus burden on the  
12 registrant, heightened scrutiny does not apply. *Jackson*, 746 F.3d at 960.

### 15 **C. STORAGE PROVISIONS OF SAFE ARE CONSTITUTIONAL.**

#### 16 *1. Home Storage Under 6 CMC § 10204*

17 The home storage provisions in 6 CMC § 10204 are constitutional because they pass  
18 intermediate scrutiny under the same analysis as in *Jackson*, 746 F. 3d 953. As stated previously,  
19 in drafting the proposal for SAFE, the Office of the Attorney General drew, wherever possible, on  
20 laws from other jurisdictions that had been subjected to, and survived, Second Amended Scrutiny.  
21 The Office of the Attorney General specifically chose to incorporate the provision upheld in  
22 *Jackson*, with minor modifications. *Compare* 6 CMC § 10204 *with* San Fran., Cal. Pol. Code §  
23 4512.  
24

25 Intermediate scrutiny applies to § 10204 for the same reason that intermediate scrutiny  
26 applied in *Jackson*: although the regulations in § 10204 regulates conduct within the scope of the  
27 Second Amendment, and requiring that unattended firearms be carried on the person, locked in a  
28



1 safe, or disabled with a trigger lock burdens the exercise of self-defense in the home, § 10204  
2 “does not substantially prevent law-abiding citizens from using firearms to defend themselves in  
3 the home,” but only regulates “the manner in which persons may exercise their Second  
4 Amendment rights.” 746 F.3d at 962–64. Otherwise stated, § 10204 does not prevent an individual  
5 from using firearms for self-defense of the home. *Id.* at 964–65. As in *Jackson*, the Commonwealth  
6 has an important governmental interest in reducing the number of firearm fatalities in the home,  
7 especially among children, and preventing firearms from being stolen. See *id.* at 965–66. As in  
8 *Jackson*, § 10204 is substantially related to the goals of preventing firearm related injury and death  
9 and preventing theft of firearms. *Id.* at 966. The number of children killed by firearms every year  
10 in the United States is alarmingly high. Everytown for Gun Safety, *#notanaccident*,  
11 <http://everytownresearch.org/notanaccident/> (last visited June 24, 2016) (interactive map)  
12 [hereinafter Everytown Survey]; Everytown for Gun Safety, *Innocents Lost* (June 24, 2014),  
13 [http://everytownresearch.org/reports/innocents\\_lost/](http://everytownresearch.org/reports/innocents_lost/). There is substantial evidence that keeping  
14 unattended firearms securely stored prevents firearm injury and death. David C. Grossmann et al.,  
15 *Gun Storage Practices and Risk of Youth Suicide and Unintentional Firearm Injuries*, 293 JAMA  
16 Pediatrics 707 (2005). Officer David Hosono, the Parties’ stipulated expert, testified that the  
17 firearm instructorship trainings that he attended taught that proper firearm storage was *more*  
18 *rigorous* than what § 10204 requires: securing an unattended firearm *unloaded* and in a locked  
19 container. Tr. of Evid. Hearing at 27 (June 22, 2016).

23 Theft is another major concern. Indeed, when the Office of the Attorney General was  
24 considering provisions to recommend the legislature, the theft of handguns was an overriding  
25 concern. Evidence demonstrates there is cause for concern. “More than 232,400 firearms are stolen  
26 each year, with household burglaries accounting for almost three times as many stolen guns as  
27 other property crimes.” Asha Rangappa, *The Cost of Freedom: Using the Tax Power to Limit*  
28

1 *Personal Arsenals*, 32 Yale L. & Pol’y Rev. inter Alia 17, 18 (2013) (quoting Lynn Langton,  
2 *Firearms Stolen During Household Burglaries and Other Property Crimes, 2005–2010*, U.S.  
3 Dep’t of Just. 3 (Nov. 2012), [http:// www.bjs.gov/content/pub/pdf/fshbopc0510.pdf](http://www.bjs.gov/content/pub/pdf/fshbopc0510.pdf).). According  
4 to Lynn Langton’s study, “[i]n 83% of burglaries and 85% of other property crimes that involved  
5 a stolen firearm, none of the stolen guns had been recovered” by the time the data was collected.  
6 Langton, *Firearms Stolen During Household Burglaries and Other Property Crimes, 2005–2010*,  
7 at 4. Stolen firearms are frequently used in crime by individuals, such as violent felons, who are  
8 barred from owning a firearm legally. Marianne W. Zawitz, *Guns Used in Crime*, Dep’t of Just. 3  
9 (July 1995), <http://www.bjs.gov/content/pub/pdf/GUIC.pdf>. Requiring firearms to be stored in a  
10 locked container is substantially related to the goal of protecting public safety and preventing  
11 firearms from being stolen. The storage provisions of 6 CMC § 10204 therefore pass intermediate  
12 scrutiny.  
13  
14

## 15 2. *Transport Provisions Under 6 CMC § 10206*

16 The analysis for transporting firearms largely mirrors the home storage provision. As for  
17 the first step, whether the regulation falls outside the scope of the Second Amendment, it appears  
18 that the regulated conduct is within the scope of the Second Amendment. it is clear that § 10206  
19 regulates conduct within the scope of the Second Amendment. Regulation of transportation is not  
20 one of the presumptively lawful rights identified in *Heller I*. As for history, the Commonwealth  
21 has been unable to locate historic regulations like the one in question. Therefore, the  
22 Commonwealth will assume at this juncture that the provision in question falls within the scope of  
23 the Second Amendment.  
24

25 Turning to the applicable level of scrutiny, intermediate scrutiny is appropriate because the  
26 requirements of § 10206 do not come very close to the core of the Second Amendment right, and  
27 §10206’s burden on *that* right is not severe. The core of the Second Amendment right is “the lawful  
28

1 purpose of self-defense,” especially “the right of law-abiding, responsible citizens to use arms in  
2 defense of hearth and home.” *Jackson*, 746 F.3d at 961 (quoting *Heller I*, 554 U.S. at 630, 635).  
3 Here, while self-defense is implicated, it occurs outside the home. Other courts have described the  
4 issue of the right to carry a loaded firearm in public as “a vast terra incognita that courts should  
5 enter only upon necessity *and only then by small degree*.” *United States v. Masciandaro*, 638 F.3d  
6 458, 475 (4th Cir. 2011) (Wilkinson, J., concurring) (emphasis added). Whatever the case, the  
7 government’s interest in regulating firearms that are being used in public, where innocent  
8 bystanders are put at risk, is far, far greater than regulating conduct that occurs in an individual’s  
9 home.<sup>6</sup>

11 The burden on the right of self-defense by the core Second Amendment right conduct is  
12 not overly severe. It is clear that it does not destroy the right to self-defense. *Jackson*, 746 F.3d at  
13 961. Like the storage provision, § 10206 makes it more difficult to use a firearm in self-defense  
14 when in a car or on foot. In a car, the firearm must be secured in the vehicle’s trunk or stored in a  
15 locked container. 6 CMC § 10206(b). If the firearm is being transported on foot, it must be stored  
16 in a locked container and be kept separate from any ammunition. 6 CMC § 10206(c). In all cases  
17 the firearm must be unloaded and stored separately from ammunition. An individual wishing to  
18 use their firearm for self-defense would need to open the trunk (or locked container), retrieve the  
19 ammunition, and load the weapon before firing. However, the right to self-defense outside the  
20 home has not been established by the Ninth Circuit or the U.S. Supreme Court, and regulations on  
21 the transportation of firearms in public are less severe than those regulating conduct in a private

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24  
25 <sup>6</sup> If Murphy is seeking a ruling that the Commonwealth is required to allow some kind of  
26 carry regime, § 10206 is not the target. Most carry regimes require special licensure, and if the  
27 Second Amendment ultimately requires States and territories to offer a carry requirement, the  
28 Commonwealth would enact legislation, following the example of other states, to license  
individuals to carry loaded firearms in public. However, if this state of affairs comes to pass, §  
10206 would still constitutionally apply to individuals that are not licensed to carry loaded firearms  
in public.

1 citizen's home.

2       The provisions of § 10206 pass intermediate scrutiny. As with §10204, the Commonwealth  
3 has important, substantial interests in preserving public safety, especially protecting the lives of  
4 children. The previously cited figures of children being the victims, or perpetrators, of accidental  
5 firearm violence are not restricted to the home. The Everytown Survey cited in the previous  
6 subsection has endeavored to record all accidental shootings occurring in America since 2015. An  
7 example is that of Patrice Price, who was shot and killed by her two-year-old son, who found a  
8 loaded handgun in the backseat of his mother's boyfriend's car and discharged it into the back of  
9 her head. Ms. Price died within minutes. <http://everytownresearch.org/notanaccident/#2077>.  
10 Another incident is that of Jamie Gilt, whose four-year-old son found a handgun under the back  
11 seat of the family truck, and accidentally discharged it into her back. Ms. Gilt survived. The Gun  
12 Violence Archive, found at <http://www.gunviolencearchive.org/>, keeps records of numerous  
13 firearm arm statistics, including the incidents in which a firearm is used defensively and is updated  
14 regularly. A collation of data for 2016 indicates that 278 children (0-11) and 1,428 teenagers (12-  
15 17) have been injured or killed as of June 28, 2016, and there have been 1,106 accidental shootings  
16 in the same time period. *Id.* It is beyond doubt that the Commonwealth has an important interest  
17 in preventing accidental shootings, whether in the home or in vehicles. Finally, the  
18 Commonwealth has an interest in preventing theft. This is a real concern as police departments  
19 around the country have started warning citizens about the danger of keeping an unsecured firearm  
20 in a car, even a locked car. *Guns Stolen from Vehicles Increasingly Used in Violent Crime*, CBS  
21 San Francisco Bay Area (Aug. 25, 2015), [http://sanfrancisco.cbslocal.com/2015/08/25/guns-](http://sanfrancisco.cbslocal.com/2015/08/25/guns-stolen-from-vehicles-increasingly-used-in-violent-crime/)  
22 [stolen-from-vehicles-increasingly-used-in-violent-crime/](http://sanfrancisco.cbslocal.com/2015/08/25/guns-stolen-from-vehicles-increasingly-used-in-violent-crime/).

23       The requirements of § 10206 are substantially related to the important government interest  
24 in protecting public safety. Requiring firearms to be locked and unloaded prevent accidental  
25  
26  
27  
28

1 shooting. Everytown study of children killed by firearms between December 2012 to December  
2 2013 concluded “Of the child shooting deaths in which there was sufficient information available  
3 to make the determination, 70 percent (62 of 89 cases) could have been prevented if the firearm  
4 had been stored locked and unloaded.” Everytown for Gun Safety, Innocents Lost (June 24, 2014),  
5 [http://everytownresearch.org/reports/innocents\\_lost/](http://everytownresearch.org/reports/innocents_lost/). “By contrast, incidents in which an  
6 authorized user mishandled a gun—such as target practice or hunting accidents—constituted less  
7 than thirty percent of the incidents.” *Id.* Section 10206 directly addresses the important need to  
8 prevent accidental child shootings. Finally, the Parties’ stipulated expert Officer Hosono testified  
9 that firearm instructors emphasize that when transporting a firearm, the firearm should be stored  
10 separately from ammunition in a locked in a box or stored in the trunk. Tr. of Evid. Hearing at 28  
11 (June 22, 2016). This is precisely what § 10206 requires. The evidence is clear: locking up guns  
12 while unattended reduces the number of incidents of accidental shootings and reduces the risk of  
13 theft.  
14

15  
16 **D. INTERMEDIATE SCRUTINY APPLIES TO THE CALIBER RESTRICTION AND THE**  
17 **CALIBER RESTRICTION SURVIVES INTERMEDIATE SCRUTINY.**

18 The SAFE’s caliber restriction is constitutional because it survives intermediate scrutiny.  
19 The Parties briefed this issue extensively in the last round of Motions for Summary Judgment. The  
20 caliber restriction was not abandoned in SAFE. Rather, its citation changed from 6 CMC § 2222(e)  
21 to 6 CMC § 10208(a)(6). As neither Party has any further argument on this point, the Parties have  
22 stipulated to submit the issue on the briefs previously filed with this Court at ECF No. 95.

23 **E. THE BAN ON LARGE CAPACITY AMMUNITION FEEDING DEVICES IS**  
24 **CONSTITUTIONAL BECAUSE INTERMEDIATE SCRUTINY APPLIES AND THE BAN ON**  
25 **LARGE CAPACITY AMMUNITION FEEDING DEVICES PASSES INTERMEDIATE**  
26 **SCRUTINY.**

27 The ban on magazines exceeding ten rounds is constitutional because intermediate scrutiny  
28 applies and the ban on magazines passes intermediate scrutiny. Although the ban on large capacity

1 magazines (LCMs) impinges on Second Amendment rights, intermediate scrutiny is proper  
2 because the ban on LCMs is not substantially burden the Second Amendment right to self-defense  
3 of hearth and home. Rather, it only regulates the manner in which an individual exercises their  
4 Second Amendment right and does not render lawfully possessed firearms inoperable. *See Fyock*  
5 *v. Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015) (application of intermediate scrutiny not an abuse  
6 of discretion); *see also N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 260 (2nd Cir. 2015)  
7 (intermediate scrutiny); *Heller II*, 670 F.3d at 1262 (intermediate scrutiny); *but see Kolbe v.*  
8 *Hogan*, 813 F.3d 160,179–80 (4th Cir. 2016) (applying strict scrutiny). The ban on LCMs passes  
9 intermediate scrutiny because the Commonwealth has an important government interest in public  
10 safety, and there is a reasonable fit between the ban on LCMs and public safety because evidence  
11 demonstrates that LCMs have been disproportionately used in mass shootings and large capacity  
12 magazines result in “more shots fired, persons wounded, and wounds per victim than do other gun  
13 attacks.” *Cuomo*, 804 F.3d at 263–64; *Fyock*, 779 F.3d at 1000; *Heller II*, 670 F.3d at 1263–64.

#### 16 1. *Intermediate Scrutiny Applies*

17 Intermediate Scrutiny applies to the ban on LCMs. It is clear that regulations on  
18 ammunition capacity fall within the scope of the Second Amendment, as regulation of magazine  
19 capacity is not one of the “presumptively lawful” regulations identified by *Heller I*, and the  
20 Commonwealth has not been able to locate historic regulations of ammunition capacity, though  
21 case law has referenced some degree of historic regulation of ammunition capacity of semi-  
22 automatic weapons. *See Fyock*, 779 F.3d at 997. The next line of inquiry is how close the ban on  
23 LCMs comes to the core of the Second Amendment right (i.e., self defense) and the severity of the  
24 burden on that right. *Jackson*, 746 F.3d at 960–61. Here, the ban on LCMs does not prohibit the  
25 possession of the quintessential self-defense weapon, i.e., handguns. *Heller II*, 670 F.3d at 1261–  
26 62 (citing Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of*  
27  
28

1 *Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150, 185 (1995) (revolvers and semi-  
2 automatic pistols are together used almost 80% of the time in incidents of self-defense with a gun)).  
3 Furthermore, the LCM ban does not prevent an individual from owning a semi-automatic rifle,  
4 including .223 caliber AR-15s, for self-defense. *Id.* at 1262. The ban does not effectively disarm  
5 individuals, but merely restricts the ammunition capacity of semi-automatic firearms.

7 2. *The Ban on Large Capacity Ammunition Feeding Devices Survives Intermediate*  
8 *Scrutiny.*

9 The ban on LCMs survives intermediate scrutiny because the Commonwealth has a  
10 significant, substantial, and important interest in public safety, and there is a reasonable fit between  
11 the ban on LCMs and protecting public safety. “Intermediate scrutiny ‘require[s] (1) the  
12 government’s stated objective to be significant, substantial, or important; and (2) a reasonable fit  
13 between the challenged regulation and the asserted objective.’” *Fyock*, 779 F.3d at 1000 (quoting  
14 *Chovan*, 735 F.3d at 1139).

15 a. Protecting Public Safety is an Important Interest

16 The first step in intermediate scrutiny is to determine the Commonwealth’s objective in  
17 banning LCMs, and whether that interest is important. “In considering a [government’s]  
18 justifications for its ordinance, we do not impose ‘an unnecessarily rigid burden of proof . . . so  
19 long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem  
20 that the city addresses.’” *Jackson*, 746 F.3d at 965 (9th Cir. 2014) (2015) (quoting *City of Renton*  
21 *v. Playtime Theatres, Inc.*, 475 U.S. 41, 50–52 (1986)). Here, the goal of restricting LCMs is to  
22 protect public safety by reducing the number of rounds that a shooter can use in a fire fight. The  
23 reasons for banning LCMs is clear. A study analyzing 93 mass shootings between January 2009  
24 and September 2013 revealed that incidents where assault weapons and large capacity magazines  
25 were involved “resulted in an average of 14.4 total people shot — 151% more people shot than in  
26 other incidents (5.7) — and 7.8 deaths — 63% more deaths than in other incidents (4.8).” Mayors

1 Against Illegal Guns, *Analysis of Recent Mass Shootings* 3 (Jan. 2013),  
2 <http://libcloud.s3.amazonaws.com/9/56/4/1242/1/analysis-of-recent-mass-shootings.pdf>. Another  
3 study demonstrates that:

4 [C]ontrolling for gunfire, guns used in shootings are 17% to 26% more likely to  
5 have LCMs than guns used in gunfire cases resulting in no wounded victims  
6 (perhaps reflecting higher numbers of shots fired and victims hit in LCM cases),  
7 and guns linked to murders are 8% to 17% more likely to have LCMs than guns  
8 linked to non-fatal gunshot victimizations (perhaps indicating higher numbers of  
9 shots fired and wounds per victim in LCM cases).

10 Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts*  
11 *on Gun Markets and Gun Violence, 1994–2003* 87 (2004), available at  
12 <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>. Semiautomatic firearms with LCMs are  
13 even dangerous in legitimate self-defense situations because “the tendency is for defenders to keep  
14 firing until all bullets have been expended, which poses grave risks to others in the household,  
15 passersby, and bystanders.” *Heller II*, 670 F.3d at 1263–64. Finally, the Parties’ stipulated expert,  
16 Officer Hosono, testified that the concern of LCM from a law enforcement perspective is the ability  
17 of an active shooter to fire more rounds without reloading, and thereby endangering more lives.  
18 Tr. of Evid. Hearing at 42 (June 22, 2016). Based on this evidence, it is clear, if not “self-evident”  
19 that the Commonwealth has an interest in promoting public safety, reducing violent crime, and  
20 preventing the danger posed by firearms to innocent bystanders. *Compare Fyock*, 779 F.3d at 1000.

21 b. Ban on LCMs is Narrowly Tailored and Substantially Related to the Objective  
22 in Preserving Public Safety.

23 The ban on LCMs survives intermediate scrutiny because it is substantially related to the  
24 goal of protecting public safety and is narrowly tailored to reach that result. “In considering the  
25 question of fit, [Courts] review the legislative history of the enactment as well as studies in the  
26 record or cited in pertinent case law, giving the [government] ‘a reasonable opportunity to  
27 experiment with solutions to admittedly serious problems.’” *Jackson*, 746 F.3d at 966 (quoting  
28



1 *City of Renton*, 475 U.S. at 52). Under intermediate scrutiny, courts must give “substantial  
2 deference to the predictive judgments of” the legislature. *Turner Broad. Sys., Inc. v. F.C.C.*, 520  
3 U.S. 180, 195 (1997). Courts must “remain mindful that, ‘[i]n the context of firearm regulation,  
4 the legislature is ‘far better equipped than the judiciary’ to make sensitive public policy judgments  
5 (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat  
6 those risks.’” *Cuomo*, 804 F.3d at 261–62. The court’s “role . . . is only to assure [itself] that, in  
7 formulating the[] laws in question, [the legislature] ha[s] ‘drawn reasonable inferences based on  
8 substantial evidence.’” *Id.* at 261–62 (quoting *Turner Broad. Sys.*, 520 U.S. at 195). As for narrow  
9 tailoring, “for purposes of intermediate scrutiny, the regulation ‘need not be the least restrictive or  
10 the least intrusive means available to achieve the government’s legitimate interests.’” *Vivid Entm’t,*  
11 *LLC v. Fielding*, 774 F.3d 566, 580 (9th Cir. 2014) (quoting *Ward v. Rock Against Racism*, 491  
12 U.S. 781, 798 (1989)).

15 Here, the ban on LCMs is substantially related to the goal of preserving public safety. The  
16 sources cited in the previous section provide concrete evidence of the harms that the ban on LCMs  
17 seeks to address. Studies demonstrate that banning LCM results in fewer firearms with LCMs  
18 being used in crime. S. Fallis & James V. Grimaldi, *Virginia Data Show Drop in Criminal*  
19 *Firepower During Assault Gun Ban*, Wash. Post (Jan. 23, 2011),  
20 <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012203452.html>. In  
21 2003, before the lapse of the federal law banning LCM, the Los Angeles Police Department  
22 recovered 38 LCMs used in connection with crime. The following year, after the lapse of the  
23 federal ban, the number rose to 1,808. Press Release, *Citizens Crime Comm’n of N.Y. City, NYC*  
24 *& LA City Councils Introduce Rezo for Federal Ban on Large Capacity Ammunition Magazines*  
25 (Mar. 2, 2011), <http://www.nycrimecommission.org/pdfs/CrimeCmsnNYCLACouncils.pdf>.  
26 Preventing access to LCM would undermine mass shooters’ ability to fire as large a number of  
27  
28

1 rounds from a semi-automatic weapon. Professor Christopher Koper opined that “bans on assault  
2 weapons and large-capacity magazines, and particularly [] ban[s] on LCMs, have the potential to  
3 prevent and limit shootings in the state over the long-run.” *Shew v. Malloy*, 994 F. Supp. 2d 234,  
4 249 (D. Conn. 2014), *aff’d in part, rev’d in part sub nom. New York State Rifle & Pistol Ass’n,*  
5 *Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) (quoting Affidavit of Professor Koper). Accordingly,  
6 there is a substantial relationship between the ban on LCMs and the important government interest  
7 in protecting public safety.  
8

9 **F. THE BAN ON ASSAULT RIFLES IS CONSTITUTIONAL BECAUSE INTERMEDIATE**  
10 **SCRUTINY APPLIES AND THE BAN ON ASSAULT RIFLES PASSES INTERMEDIATE**  
11 **SCRUTINY.**

12 The ban on assault rifles survives intermediate scrutiny because the Commonwealth has a  
13 significant, substantial, and important interest in public safety, and there is a reasonable fit between  
14 the ban on assault rifles and protecting public safety. As an initial matter, Murphy has not alleged  
15 that he seeks to possess either an “assault pistol” or “assault shotgun” as defined by SAFE.  
16 Therefore, this Court should “construe the . . . challenge to the ban on assault weapons as going  
17 only to the prohibition of certain semi-automatic rifles.” *Heller II*, 670 F.3d at 1260.

18 *1. Intermediate Scrutiny Applies*

19 Intermediate scrutiny applies to the ban on “assault rifles” as defined by SAFE.

20 The ban on assault rifles impinges upon the right protected by the Second Amendment.  
21 First, the ban on “assault rifles” does not resemble any of the “presumptively lawful” regulations  
22 identified in *Heller I*. Second, historical evidence does not support a finding of “long standing”  
23 regulation of “assault rifles,” and other courts considering the question have either not found a  
24 history of regulation justifying treating “assault rifles” as being outside the scope of the Second  
25 Amendment, or have assumed that similar bans on “assault rifles” impinge upon the right protected  
26 by the Second Amendment. *See Kolbe*, 813 F.3d at 175–78; *Cuomo*, 804 F.3d at 254–57; *Heller*  
27  
28

1 II, 670 F.3d 1261–62. Without further guidance from the Supreme Court or the Ninth Circuit on  
2 Second Amendment analysis, it is fair to assume, as other circuits have, that SAFE’s ban on  
3 “assault weapons” impinges on Second Amendment rights. *See Cuomo*, 804 F.3d at 254–57;  
4 *Heller II*, 670 F.3d 1261–62.

5  
6 The second step of Second Amendment analysis, considering (1) “how close the law comes  
7 to the core of the Second Amendment right,” and (2) “the severity of the law’s burden on that  
8 right” justifies the use of intermediate scrutiny. The ban on “assault rifles” concededly implicates  
9 the core right of the Second Amendment, “the right of or law-abiding, responsible citizens to use  
10 arms in defense of hearth and home.” *Jackson*, 746 F.3d at 961 (quoting *Heller I*, 554 U.S. at 635).  
11 The ban on “assault rifles” limits a homeowners’ choice of rifles available for self-defense.  
12 Importantly, however, the severity of SAFE’s ban on “assault rifles” is not severe enough to justify  
13 strict scrutiny. First, the law does not restrict “an entire class of arms.” *Cuomo*, 804 F.3d at 260.  
14 Rather, it prevents certain semi-automatic weapons with features that make them more dangerous,  
15 especially in mass shooting contexts. Furthermore, semi-automatic rifles that are .223 or less are  
16 exempted from the definition of “assault rifle.” Second, the ban leaves open alternative channels  
17 of self-defense of the home. *Jackson*, 746 F.3d at 961. The ban does not affect the “quintessential  
18 self-defense weapon,” the hand gun. *Heller II*, 670 F.3d at 1262. Furthermore, the ban does not  
19 affect firearms that are .223 caliber or less. 6 CMC § 10101(e)(1)(i). This means that law-abiding  
20 citizens of the Commonwealth are still allowed to use .223 AR-15 style rifles for self-defense of  
21 the home. Given that the ban on assault rifles only prohibits ownership of a subset of  
22 semiautomatic rifles and leaves individuals a wide range of alternatives firearms to use for self-  
23 defense, intermediate scrutiny is appropriate.

## 24 2. The Assault Rifle Ban Passes Intermediate Scrutiny

25 The assault rifle ban passes intermediate scrutiny because the government has an important  
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1 interest in protecting public safety and the restriction of semiautomatic rifles above .223 caliber  
2 that specified military style features is substantially related to that interest.

3         It is clear, if not self-evident, that protecting public safety is an important government  
4 interest. The military-style features of the banned weapons are cause for concern, especially given  
5 the number of mass shootings with assault rifles in recent years. Other circuits have credited  
6 testimony of experts such as Brian Siebel, who has testified “‘the military features of semi-  
7 automatic assault weapons are designed to enhance their capacity to shoot multiple human targets  
8 very rapidly’ and ‘[p]istol grips on assault rifles . . . help stabilize the weapon during rapid fire and  
9 allow the shooter to spray-fire from the hip position.’” *Heller II*, 670 F.3d at 1262–63. According  
10 to Officer Hosono developments such as the “bump stock” are able to harness the firearm’s recoils  
11 to make a semi-automatic firearm fire in the same manner as an automatic. Tr. of Evid. Hearing at  
12 24–26 (June 22, 2016). Furthermore, “assault weapons account for a larger share of guns used in  
13 mass murders and murders of police, crimes for which weapons with greater firepower would seem  
14 particularly useful.” Koper, *supra*, at 51. “Assault weapons or high-capacity magazines were used  
15 in at least 14 of the incidents (15%). These incidents resulted in an average of 14.4 total people  
16 shot — 151% more people shot than in other incidents (5.7) — and 7.8 deaths — 63% more deaths  
17 than in other incidents (4.8).” Mayors Against Illegal Guns at 3. Mass shootings are an epidemic  
18 in the United States; as of time of writing, 163 mass shooting (defined as four or more shot in a  
19 single incident) have occurred leaving 236 individuals dead and 643 wounded.

20         The ban is substantially related to the important interest in protecting public safety because  
21 reducing the number of assault rifles available will save lives. In his study of the effects of the  
22 Federal Assault Weapons Ban, Professor Koper stated “criminal use of [assault weapons] . . .  
23 declined after” the federal assault weapons ban enacted in 1994 “independently of trends in gun  
24 crime” *Heller II*, 670 F.3d at 1263 (quoting Koper, *supra*, at 87). Importantly, in intermediate  
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1 scrutiny, courts must be mindful that “it is legislature’s job, not [the judiciary’s], to weigh  
2 conflicting evidence and make policy judgments.” *Kachalsky v. Cty. of Westchester*, 701 F.3d 81,  
3 99 (2d Cir. 2012). There is substantial evidence “attacks with semiautomatics – including AWs  
4 and other semiautomatics equipped with LCMs – result in more shots fired, more persons hit, and  
5 more wounds inflicted per victim than do attacks with other firearms.” Koper, *supra*, at 84. Rather  
6 than banning all semiautomatics, or semiautomatic rifles, the legislature banned a subset of  
7 semiautomatic rifles above .223 caliber with enumerated military-style alterations.  
8

9 **G. TAX ON HANDGUNS IS CONSTITUTIONAL BECAUSE IT IS WITHIN THE**  
10 **COMMONWEALTH’S POWER TO TAX, IS A REVENUE GENERATING MEASURE, IS**  
11 **LIMITED IN TIME, AND THERE IS A PERVASIVE HISTORICAL EVIDENCE OF**  
12 **LEVYING EXCISE TAXES ON FIREARMS.**

13 The \$1000 tax on pistols contained in 3 CMC § 1402(h) is constitutional because it is a  
14 legitimate use of the Commonwealth’s unique ability under the Covenant to control its own  
15 customs territory. The tax is primarily revenue generating and is made for the express purpose of  
16 funding a study on the increased costs associated with the introduction of handguns into the  
17 Commonwealth. Although the tax may have an incidental deterrent effect, the Supreme Court has  
18 consistently held that this is acceptable. *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937).  
19 Furthermore, Courts do not look at the legislature’s motive in passing a tax. Although there are  
20 some limitations on the power of taxation, none are implicated here.

21 To the extent the Court reviews the measure under the Second Amendment, which it should  
22 not, the taxation of firearms falls outside the scope of the Second Amendment because there is a  
23 long and pervasive history of the United States taxing firearms that are imported into its borders.

24 *1. Legislative Power & Control over Customs*

25 The Commonwealth has very broad powers over legislation. Under Covenant § 206, the  
26 power of the legislature “extend[s] to all rightful subjects of legislation.” “This phrase is the  
27 broadest formulation of legislative power which is possible for the Commonwealth” limited only  
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1 by the terms of the Covenant, the Constitution and laws of the United States, and the Constitution  
2 of the Commonwealth. Section by Section Analysis of the Covenant 24–25 (1975). The Covenant  
3 grants the Commonwealth taxation power over goods that are imported into the Commonwealth.  
4 Covenant § 602 grants the Commonwealth to impose taxes “as it deems appropriate.” Covenant §  
5 604(b) provides that the Commonwealth the “authority to impose excise taxes . . . upon goods  
6 imported into its territory.” Importantly, as the Commerce Clause does not apply to the  
7 Commonwealth under § 501(a), the Commonwealth is not restricted in any way from levying  
8 excise taxes against goods that are imported from the several States.  
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10 As the Commonwealth has taxation powers with regards to customs far beyond those of  
11 the several States, looking to precedent involving the federal government’s exercise of its taxation  
12 authority.  
13

## 14 2. *The Power to Tax*

15 The power to tax is one of the most significant and far reaching powers of government.  
16 The taxation power is very broad. *See* Leo P. Martinez, *Of Fairness and Might: The Limits of*  
17 *Sovereign Power to Tax After Winstar*, 28 Ariz. St. L.J. 1193, 1196 (1996). “A tax is not any the  
18 less a tax because it has a regulatory effect, and it has long been established that an Act of Congress  
19 which on its face purports to be an exercise of the taxing power is not any the less so because the  
20 tax is burdensome or tends to restrict or suppress the thing taxed.” *Sonzinsky v. United States*, 300  
21 U.S. 506, 513 (1937); *see also Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2596 (2012).  
22 This is true even when the tax implicates rights under the U.S. Constitution, though this statement  
23 is qualified below. *Sonzinsky*, 300 U.S. 506 (taxation of firearms); *United States v. Lee*, 445 U.S.  
24 252 (1982) (freedom of religion).  
25

26 Courts are generally limited in their ability to strike down taxes. The primary question for  
27 the Court is whether revenue generation is the main purpose of the tax. As will be shown in the  
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1 next paragraph, “[a] tax cannot bar an activity, but the Supreme Court has upheld taxes that  
2 discourage an activity or make it difficult or expensive.” Martinez, *Of Fairness, supra*, at 1201  
3 (1996) (citing *Sonzinsky*, 300 U.S. 506). “The amount of a tax is apparently not a factor the Court  
4 focuses on, even if the excessive amount demonstrates a deterrent purpose.” *Id.* at 1202. Indeed:

5 [T]he Court has expressed the idea that even a tax with a particularly steep rate or  
6 an “obvious deterrent purpose” does not necessarily evince an inappropriate use of  
7 the power to tax. So long as revenue generation can be labeled as the main purpose  
8 for the tax, the Court likely will disregard the high rate and the deterrent effect.

9 *Id.* (citing *Dep’t of Revenue of Montana v. Kurth Ranch*, 511 U.S. 778, 780 (1994)). Furthermore,  
10 there is a longstanding general rule is that “[i]nquiry into the hidden motives which may move  
11 Congress to exercise a power constitutionally conferred upon it is beyond the competency of  
12 courts.” *Sonzinsky*, 300 U.S. at 513–14; *Fernandez v. Wiener*, 326 U.S. 340, 362 (1945). Further,  
13 Courts “will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax,  
14 to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by  
15 the Federal Constitution.” *Sonzinsky*, 300 U.S. at 514. This statement of the law is in no way  
16 intended to imply that the power to tax is unlimited. Indeed, while the amount of the tax alone  
17 cannot shatter the presumption of validity “even though there has been ground for suspecting, from  
18 the weight of the tax” that there is an improper purpose, there is not deference when it is evident  
19 from the face of the statute in question that the goal is an impermissible purpose. *Child Labor Tax*  
20 *Case*, 259 U.S. 20, 38 (1922) (facial purpose was to regulate labor, a power reserved to the states);  
21 *see also Minn. Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 581 (1983).

22  
23 There are important limitations on the power to enact a tax. A tax may not have an  
24 exclusively deterrent purpose; it must be tied to revenue generation. Martinez, *Of Fairness, supra*,  
25 at 1201–02; *Sonzinsky*, 300 U.S. 506. A tax may not be used to inflict punishment or assess  
26 criminal penalties, such as a tax on illegal drugs that is only imposed on criminals. *Kurth Ranch*,  
27 511 U.S. at 779; Martinez, *Of Fairness, supra*, at 1204–05. “A tax subsequent to and in addition  
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1 to criminal penalties is inappropriate if its purpose ‘may not fairly be characterized as remedial,  
2 but only as a deterrent or retribution.’” Martinez, *Of Fairness, supra*, at n.69 (quoting *United States*  
3 *v. Halper*, 490 U.S. 435, 448-49 (1989)); *see also Kurth Ranch*, 511 U.S. at 79 (O’Connor, J.,  
4 dissenting); *Child Labor Tax Case*, 259 U.S. at 34 (U.S. 1922). A tax may also not be used to treat  
5 individuals or groups of individuals in a harsh and oppressive manner, *United States v. Carlton*,  
6 512 U.S. 26, 30 (1994), though commenters have noted that challenges based on this provision  
7 have not been successful, despite the apparent strengths of many objections. Tracy A. Kaye &  
8 Stephen W. Mazza, *United States-National Report: Constitutional Limitations on the Legislative*  
9 *Power to Tax in the United States*, 15 Mich. St. J. Int’l L. 481 (2007); Martinez, *Of Fairness*,  
10 *supra*, at 1207–11; Leo P. Martinez, “*To Lay and Collect Taxes*”: *The Constitutional Case for*  
11 *Progressive Taxation*, 18 Yale L. & Pol’y Rev. 111, 114 (1999).

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13  
14 Most importantly, a tax that on its face singles out a constitutionally protected group for  
15 differential treatment rights is suspect. A tax that a separate constitutionally protected group must  
16 withstand constitutional scrutiny. The polestar for this proposition is *Minn. Star*, 460 U.S. 575. In  
17 *Minn. Star*, the State of Minnesota imposed a tax on ink and paper used exclusively in publications  
18 such as newspapers. *Id.* at 578. At the same time, the statute exempted the first \$100,000. *Id.* “After  
19 the enactment of the \$100,000 exemption, 11 publishers, producing 14 of the 388 paid circulation  
20 newspapers in the State, incurred a tax liability.” *Id.* The Plaintiff, one of the newspapers taxed,  
21 sued alleging a violation of freedom of press. The Court held that the taxation scheme targeted the  
22 press, and that “[a] tax that burdens rights protected by the First Amendment cannot stand unless  
23 the burden is necessary to achieve an overriding governmental interest.” *Id.* at 582. The Court cited  
24 *Lee* as an example of where the social security tax was constitutional, despite the fact that it  
25 infringed on the religious beliefs of the Amish, as an example where an overriding interest  
26 qualified. *Id.* (citing *Lee*, 455 U.S. 252). The Court reasoned “differential treatment, unless  
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1 justified by some special characteristic of the press, suggests that the goal of the regulation is not  
2 unrelated to suppression of expression, and such a goal is presumptively unconstitutional.” *Id.* at  
3 585. The Court reasoned that the State could have taxed all businesses in the same manner. The  
4 Court next held that the justification of raising revenue, “standing alone,” could not justify the tax  
5 in question. *Id.* at 587. Finally, the Court held the differential treatment of the 11 affected  
6 newspapers violated the First Amendment, reasoning” when the exemption selects such a narrowly  
7 defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a  
8 few of the largest newspapers than an attempt to favor struggling smaller enterprises.” *Id.* at 592.

### 10 3. *Taxation of Firearms by the Federal Government*

11 The extent to which *Minn. Star* will impact the challenged tax is unclear because of the  
12 differences between the First and Second Amendments. Scholars examining the issue have pointed  
13 to the differences in the way taxation affects First and Second Amendment Rights. *See, e.g.,*  
14 Rangappa, *supra*, at 20; Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows*  
15 *from A Social Welfare Perspective*, 56 UCLA L. Rev. 1041, 1083–1088 (2009). The  
16 Commonwealth will address the distinctions in the next section.

18 Important to the Second Amendment analysis, the United States has a history of taxing the  
19 sale of firearms by manufacturers, producers, and importers. The United States currently levies an  
20 excise tax on sale of fire arms. 26 U.S. § 4281. The current scheme taxes the sale of firearms by  
21 those groups. 26 U.S.C. § 4281. The tax involves differential treatment of firearms: handguns are  
22 taxed at 10% of the sale price, all other firearms are taxed at 11% of the sale price. 26 U.S.C. §  
23 4281. The United States has taxed firearms since at least 1919. Revenue Act of 1918, Pub. L. No.  
24 254, §900(10). The Revenue Act of 1918 taxed all firearms, other than those sold to the federal,  
25 state, or local governments.<sup>7</sup> In 1934, Congress taxed the sale of every firearm at \$200 per firearm.

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27  
28 <sup>7</sup> The Commonwealth is still locating data on the price of firearms in 1919, and will address

1 National Firearms Act of June 26, 1934, c. 757, 48 Stat. 1236; *Sonzinsky*, 300 U.S. at 511.  
2 Accounting for inflation's effect on purchasing power, \$200.00 in 1934 had the same purchasing  
3 power as \$3,585.61 today. Bureau of Labor Stats., CPI Inflation Calculator,  
4 [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm).

#### 5 6 4. Application

7 The \$1,000.00 tax on firearms in 3 CMC § 1402(h) is a constitutional exercise of the  
8 Commonwealth's taxations power. The Commonwealth has the power to tax, and has significant  
9 power to levy excise taxes. The tax is legitimate because the primary goal of the tax is to generate  
10 revenue to deal with the costs associated with the introduction of handguns. Specifically, the tax  
11 is meant to provide interim funding to the agencies that will be most affected by the introduction  
12 of handguns, and to update government buildings with security systems such as metal detectors.  
13 PL 19-42, § 15. The measure is an interim tax; at the latest it will expire on April 11, 2017. *Id.*  
14 Currently, the Governor is commissioning a study to find the cost of updating the Commonwealth  
15 government's infrastructure to deal with the threat of increased handgun violence, and legislation  
16 must be imposed at least 60 days before the tax expires. *Id.*

17  
18 The tax is distinguishable from the tax in *Minn. Star*. There, the tax at issue was designed  
19 to specifically target 11 out of 388 publishers statewide. Here, the tax applies equally to all actors,  
20 commercial and noncommercial.

21  
22 As for Second Amendment analysis, the tax does not impinge on the Second Amendment  
23 because, although not one of the presumptively lawful regulations in *Heller*, there is a pervasive  
24 history of taxing firearms. Following *Heller I*, the Ninth Circuit first looks at whether the challenged  
25 measure fits within "historical understanding of the Second Amendment right." *Jackson*, 746 F.3d

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28 the subject in the Opposition to the Cross Motion for Summary Judgment filed by Murphy. The  
Commonwealth may need to pay to access archives of major retailers at the time.

1 at 960. The United States has taxed firearms since at least 1919, and the National Firearms Act of  
2 1934 imposed a tax in an amount that would equal over \$3,500 in 2016. As there is historical  
3 evidence of pervasive regulation of the kind at issue here, taxation of firearms falls outside the  
4 historic scope of the Second Amendment, and the analysis ends; under current analysis historical  
5 evidence has the final say.<sup>8</sup> *Id.*

6  
7 **V. CONCLUSION**

8 The Commonwealth is entitled to summary judgment on all counts.

9  
10 RESPECTFULLY  
11 SUBMITTED.

12 DATED: June 30, 2016

OFFICE OF THE ATTORNEY GENERAL

/s/ Charles E. Brasington  
Charles E. Brasington  
Assistant Attorney General  
Attorney for Defendants

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27 <sup>8</sup> There is good reason for all parties to the Second Amendment debate to criticize giving  
28 so much weight to the historical record, see *Friedman v. City of Highland Park*, 784 F.3d 406, 409  
(7th Cir. 2015), but it remains the law of the Ninth Circuit.

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**CERTIFICATE OF SERVICE**

I hereby certify that the above and foregoing has been electronically filed this 30th day of June 2016. Further, I certify that a true and correct copy of the foregoing motion was served by electronic mail at paul.murphy.officialmail@gmail.com.

/s/ Charles E. Brasington  
Charles E. Brasington  
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